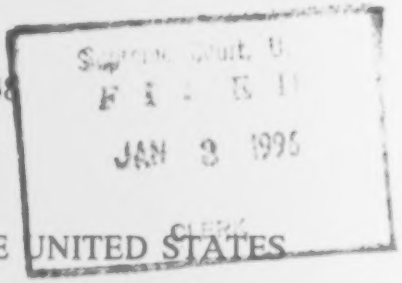
No. 95-83



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by The New York City Department of Police,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether the District Court's interlocutory order granting the New York City Corporation Counsel leave to withdraw as petitioners' counsel constitutes a "collateral order" subject to immediate appeal under 28 U.S.C. § 1291?

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No. 95-838

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SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by The New York City Department of Police,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(a)

In this 42 U.S.C. § 1983 action, plaintiff Arthur Schwartz ("plaintiff") alleges, *inter alia*, that defendants-petitioners Terrance Collins, John Carney and Darin Bured,

police officers employed by defendant-respondent, the City of New York, used excessive force against him.

By order dated September 16, 1994, the United States District Court for the Eastern District of New York (Raggi, U.S.D.J.) granted the New York City Corporation Counsel's motion to be relieved as petitioners' counsel in this action. Thereafter, petitioners filed a notice of appeal taking an appeal "as of right" from the District Court's interlocutory order.

Petitioners seek to have this Court review by way of certiorari an order of the United States Court of Appeals for the Second Circuit, entered June 15, 1995, which dismissed petitioners' appeal. The Court of Appeals held that the District Court's order was not subject to immediate review pursuant to 28 U.S.C. § 1291 because (1) it was not a final order and (2) the order did not constitute a "collateral order".

(b)

In his complaint, plaintiff alleged that on April 16, 1992, at approximately 11:00 A.M., he was parked at a "no standing" zone (19, ¶ 11).[1] While plaintiff was inside a store, he discovered that petitioner Police Officer Collins ("Collins") was issuing a parking ticket for his vehicle. Plaintiff immediately ran out of the store and got into his vehicle. At that point, petitioner Collins advised plaintiff that if he drove away, the ticket would be mailed to him. In response, plaintiff

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[1] Numbers in parentheses refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit; numbers preceded by the letter "A" refer to the Appendix annexed to the Petition for a Writ of Certiorari.

"told him to do what he had to do and then drove away" (19-20, ¶ 11).

Petitioner Collins then followed plaintiff on his scooter. When plaintiff stopped at a traffic light, plaintiff asked Collins why he was following him. At that time, "words were exchanged and Collins said he was going to charge Schwartz [plaintiff] with disorderly conduct" (20, ¶ 14). Plaintiff again told Collins that he could do what he wanted to do and then drove away (20, ¶ 14).

Petitioner Collins continued to follow plaintiff until he parked at a location, approximately four blocks from where the initial exchange occurred. At that point, Collins "pulled up very close" to plaintiff's vehicle, got off his scooter, and walked to the driver's side. He told plaintiff that he was under arrest and to get out of the vehicle (20, ¶ 15). Plaintiff further alleged that "Collins then opened the car door, and reached in and began to pull" him out of the car (20, ¶ 15).

Petitioners Police Officers Carney and Bured, who were parked across the street, then came over. As "Collins was pulling plaintiff out of the car, one of the other defendants [petitioners] pushed plaintiff from behind, causing Collins and Schwartz to fall with the other defendant [petitioner] falling on top of them" (20-21, ¶ 17).

Plaintiff was then handcuffed and placed face down on the ground. One of the petitioners then allegedly struck plaintiff in the back of his head with a nightstick, repeatedly kneed or kicked him in his abdomen and ribs and stood on plaintiff's wrists and head (21, ¶ 18).

Thereafter, plaintiff received medical treatment at Coney Island Hospital (21, ¶ 19). According to plaintiff, his face, head, wrists, hands and ribs were injured during this incident. Further, stitches were necessary to close wounds on his scalp and chin (22, ¶ 21).

Plaintiff commenced this action on or about July 12, 1993, against the City and petitioners Collins, Carney and Bured.

(c)

On January 24, 1993, plaintiff filed a complaint with the Civilian Complaint Review Board (CCRB) regarding the above incident (96). The CCRB is an agency independent of the Police Department which has the power to "receive, investigate, hear, make findings and recommend action upon complaints" by the public against police officers, alleging misconduct involving, *inter alia*, excessive use of force, abuse of authority, discourtesy, or use of offensive language. The findings and recommendations of the CCRB are forwarded to the Police Commissioner. New York City Charter, § 440(c)(1).

The Office of the Corporation Counsel of the City of New York ("Corporation Counsel") initially determined that it would represent the petitioners as well as the City in this action. At the time the office made this decision, the charges against the petitioners had not been substantiated by the CCRB.

Subsequent to the filing of the answer, however, on November 17, 1993, the CCRB substantiated several of the charges against petitioner Collins and recommended that the Police Department initiate disciplinary charges against Collins.

The reasons for the substantiation of the charges against Collins were summarized by one of the CCRB Members, a former New York City Police Commissioner, who stated (92-93):

> Collins was a scooter officer attempting to issue a summons to complainant who drove off. Collins gave chase, called for back-up and engaged in an altercation & physical struggle with a motorist in order to issue a summons. Complainant, unexplainably winds up in hospital. Credibility is with the complainant... Unnecessary chase [,] unnecessary confrontation[,] unnecessary arrest.

The charges against petitioners Bured and Carney were unsubstantiated.

(d)

Thereafter, the Corporation Counsel's Office reconsidered its determination to represent petitioners in light of the subsequent finding by the CCRB substantiating certain charges against petitioner. Pursuant to New York General Municipal Law § 50-k, the City shall provide for the defense of a City employee where the Corporation Counsel has determined that the "employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred."

In a letter dated March 9, 1994, the Corporation Counsel's Office informed petitioner Collins that based on a "consideration of facts that have arisen subsequent to September 1993, *i.e.* the findings of the Civilian Complaint Review Board, we have concluded after careful consideration that we are unable to continue to represent you in this matter" (38).

The Corporation Counsel's Office also determined that it could not represent petitioners Carney and Bured because its "continued review reveals that these two officers essentially support Officer Collins in this matter" and, therefore, the Office's continued representation of these two officers would present a conflict (44).

Thereafter, the Corporation Counsel's office moved to be relieved as counsel for petitioners (7-44).

OPINIONS BELOW

(a)

The District Court Opinion

In granting the Corporation Counsel's motion to withdraw as attorney for petitioners, the District Court reasoned that under General Municipal Law § 50-k and judicial precedents, the Corporation Counsel is to make the determination whether to represent, and his determination regarding representation cannot be set aside unless it is arbitrary and capricious. The Court found that the Corporation Counsel's determination that it could not continue representation of petitioners in this case was not arbitrary and capricious.

(b)

The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit dismissed petitioners' appeal on the grounds that "the order is not a final judgment and does not fall within the 'collateral order' exception to the final judgment rule" (A6).

The Court of Appeals, citing this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), noted that in order to fall within the narrow "collateral order" exception, an order must satisfy three requirements: it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment (A8-A9).

The Court then concluded that the District Court order permitting Corporation Counsel to withdraw as counsel failed to meet the second and third *Coopers & Lybrand* requirements. The Court reasoned (A10):

> First, whether the City is obligated to represent the officers in this action cannot be separated from the merits of the action, because the question turns in part on precisely what the officers did: if an officer's conduct was in violation of a rule or regulation of the New York City Police Department, the City (through its Corporation Counsel) does *not* have an obligation to defend the

officer under § 50-k(2). Second, the order is not effectively unreviewable on appeal from a final judgment, because if it is ultimately determined that the City is obligated under § 50-k(2) to provide for the officers' defense, the *City* can simply be ordered to pay the officers' attorneys' fees. The officers' rights will not have been irretrievably lost in the process [italics in the original].

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court of Appeals properly applied the analysis set forth by this Court in determining that the District Court interlocutory order permitting the Corporation Counsel to withdraw as petitioners' counsel did not constitute a collateral order subject to immediate appeal pursuant to 28 USC § 1291.

Petitioners have not presented a compelling question to be reviewed by this Court. This Court, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), set forth the three requirements which an interlocutory District Court order must satisfy to constitute a collateral order subject to immediate review pursuant to 28 USC § 1291.

Petitioners do not contend that the Court of Appeals applied the wrong standard. Rather, petitioners seek review because the Court of Appeals allegedly misapplied the *Coopers & Lybrand* analysis. As set forth in Rule 10 of this Court's Rules, however, the "misapplication of a properly stated rule of law" is rarely the basis for the granting of a writ of certiorari.

In any event, the Court of Appeals properly determined that the District Court order does not meet the second and third requirements of the "collateral order" exception. First, the order does not satisfy the second prong of the *Coopers & Lybrand* inquiry since the determination as to whether the Corporation Counsel had a rational basis to withdraw as counsel for petitioners is not "completely separate from the merits" of the underlying action. The Corporation Counsel's Office determined that it could no longer represent petitioner Collins because his conduct violated a rule or regulation of the New York City Police Department. This was based on the CCRB's findings substantiating certain charges against Collins. The conduct complained of in the CCRB charges is the same conduct which is the basis of the instant action. With respect to petitioners Bured and Carney, the Corporation Counsel's Office determined that there would be a conflict if it continued to represent these officers because their version of the facts apparently supports Collins. Clearly, the determination as to whether Collins in fact violated a rule or regulation is entwined with the merits of the underlying litigation. Thus, the second prong of the test has not been satisfied since the merits of this appeal are not completely separate from the merits of the underlying action.

Additionally, the District Court order does not meet the second prong of the test because a determination as to whether petitioners have been prejudiced by the Corporation Counsel's withdrawal as counsel can only be made after there has been a resolution of the underlying action. In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), this Court held that an order disqualifying an attorney from representing a party did not constitute a collateral order for this very reason. This Court stated (472 U.S. at 438-439):

> If the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," *ibid.*, then a disqualification order, though "final," is not independent of the issues to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced. If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide, any subsequent appeal of the disqualification ruling would fail. ... [Thus] the disqualification ruling would be inextricably tied up in the merits.

The District Court order relieving Corporation Counsel as petitioners' counsel in this case is analogous to an order disqualifying an attorney. In both situations, the client's choice of counsel is affected.

This Court in *Richardson-Merrell, Inc. v. Koller*, held that an order disqualifying an attorney not only failed to meet the second prong of the *Coopers & Lybrand* analysis, but also the third condition of the "collateral order" exception because such an order can be effectively reviewed on appeal from a final judgment.

Any argument that the District Court order in this case is distinguishable from a disqualification order because it denies petitioners not only of their choice of counsel but "free" counsel would be meritless. First, such an argument would be disingenuous since the PBA's counsel would provide representation in such cases (44). As a result of collective bargaining, the City makes a per officer contribution to a civil legal representation fund which is administered by the PBA. The purpose of this fund is to provide legal representation to police officers in the defense of civil litigation where the officer is not represented by the Corporation Counsel.[2]

Further, as the Court of Appeals reasoned in this case, the District Court order "is not effectively unreviewable on appeal from a final judgment, because if it is ultimately determined that the City is obligated under § 50-k(2) to provide for the officers' defense, the City can

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[2] In fact, PBA counsel represented petitioners before the Court of Appeals and are presently representing them before this Court.

simply be ordered to pay the officers' attorneys' fees. The officers' rights will not have been irretrievably lost in the process" (A10).

Contrary to petitioners' argument (Petition, pp. 12-13), the Second Circuit's decision in this case is not inconsistent with its earlier decision in *Mercurio v. City of New York*, 758 F.2d 862 (2d Cir., 1985). Even if it were, this would not be a basis for the grant of a writ of certiorari since a court may depart from its own precedents.

In sum, petitioners have not presented a compelling question to be reviewed by this Court since they are merely alleging a "misapplication of a properly stated rule of law." Further, the Court of Appeals properly dismissed petitioners' appeal from the District Court's interlocutory order granting Corporation Counsel permission to withdraw as petitioners' counsel. The order does not constitute a "collateral order" because (1) the merits of this appeal are entwined with the merits of the underlying action and (2) the order is "not effectively unreviewable on appeal from a final judgment."

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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